

May 17, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Charles J. Fitzpatrick

Date of Filing: April 4, 2005

Case Number: TFA-0097

On April 4, 2005, Charles J. Fitzpatrick (Fitzpatrick) filed an appeal from a determination issued to him on March 3, 2005 by the Office of Repository Development (ORD) of the Department of Energy's Office of Civilian Radioactive Waste Management (OCRWM), in response to a request for documents that Fitzpatrick submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This appeal, if granted, would require ORD to release additional responsive information to Fitzpatrick or provide a detailed explanation of its reasons for withholding such material.

I. Background

On January 26, 2005, Fitzpatrick requested six documents from ORD:

1. Continued Storage Analysis Report (scenarios 1 and 2) – November 4 [,1998]
2. Reference Cost Report for Continued Storage (scenarios 1 and 2) – November 12 [,1998]
3. Comparison Sheet (scenarios 1 and 2) – November 12 [,1998]
4. Continued Storage Analysis Report (scenario 1 only) – November 12 [,1998]
5. Reference Cost Report for Continued Storage (scenario 1 only) – November 12 [,1998]
6. Comparison Sheet (scenario 1 only) – November 12 [,1998]

On March 3, 2005, ORD issued a determination in response to Fitzpatrick's request. Letter from ORD to Fitzpatrick (March 3, 2005) (Determination Letter). ORD stated that document (2) was publicly available and a copy had been included in documents previously provided to Fitzpatrick. Determination Letter at 1. ORD withheld the remaining five documents in their entirety, citing Exemption 5 of the FOIA. *Id.* ORD justified withholding the documents by explaining that "these documents were determined to involve communications that are pre-decisional and are

part of a deliberative process in that they involve recommendations and opinions resulting from a review of Yucca Mountain site activities.” *Id.*

Fitzpatrick filed the present appeal on April 4, 2005. Letter from Fitzpatrick to OHA (April 1, 2005) (Appeal).

II. Analysis

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are “inter-agency or intra-agency” memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency’s deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp 939 (Ct. Cl. 1958).

In its determination letter, ORD withheld the requested documents (1), (3), (4), (5), and (6) under Exemption 5. In the processing of this appeal, we have learned that documents (1), (3), and (6) were not in existence at the time of the initial request. Electronic mail message from Diane Quenell, ORD, to Diane DeMoura, OHA (April 21, 2005). According to ORD,

[D]ocuments 1, 3, and 6 were never made part of the Final EIS Record or put in the Records Information System (RIS), therefore, a copy of these documents cannot be located. These documents were prepared at Lake Barrett’s direction (at one time he was OCRWM’s Acting Director, among other positions). He retired several years ago and we cannot determine what happened to all his documents, especially draft documents. At the time we responded to this request, [ORD] was not aware that we could not locate the documents, only that they were drafts and never finalized.

Id. Consequently, ORD is unable to produce documents which no longer exist.

The remaining documents to be considered here are documents (4) and (5). ORD must give further consideration to those documents. The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the

portions which are exempt under this subsection.” 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so “inextricably intertwined” that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose “an inordinate burden” to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979). Since the ORD determination letter did not identify segregable, nonexempt factual material in documents (4) and (5), we find ORD’s determination to be insufficient in this regard. Our review finds that these documents contain factual information that appears to us to be reasonably segregable from the exempt portions of the documents. Accordingly, we shall remand this matter to ORD. On remand, ORD must review documents (4) and (5) and segregate and release all purely factual portions, or issue a new determination that justifies withholding the factual portions of those documents.

It Is Therefore Ordered That:

- (1) The Appeal filed on April 4, 2005 by Charles J. Fitzpatrick, OHA Case No. TFA-0097, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.
- (2) This matter is hereby remanded to the Office of Civilian Radioactive Waste Management, Office of Repository Development for further proceedings in accordance with the instructions set forth in this Decision and Order.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 17, 2005